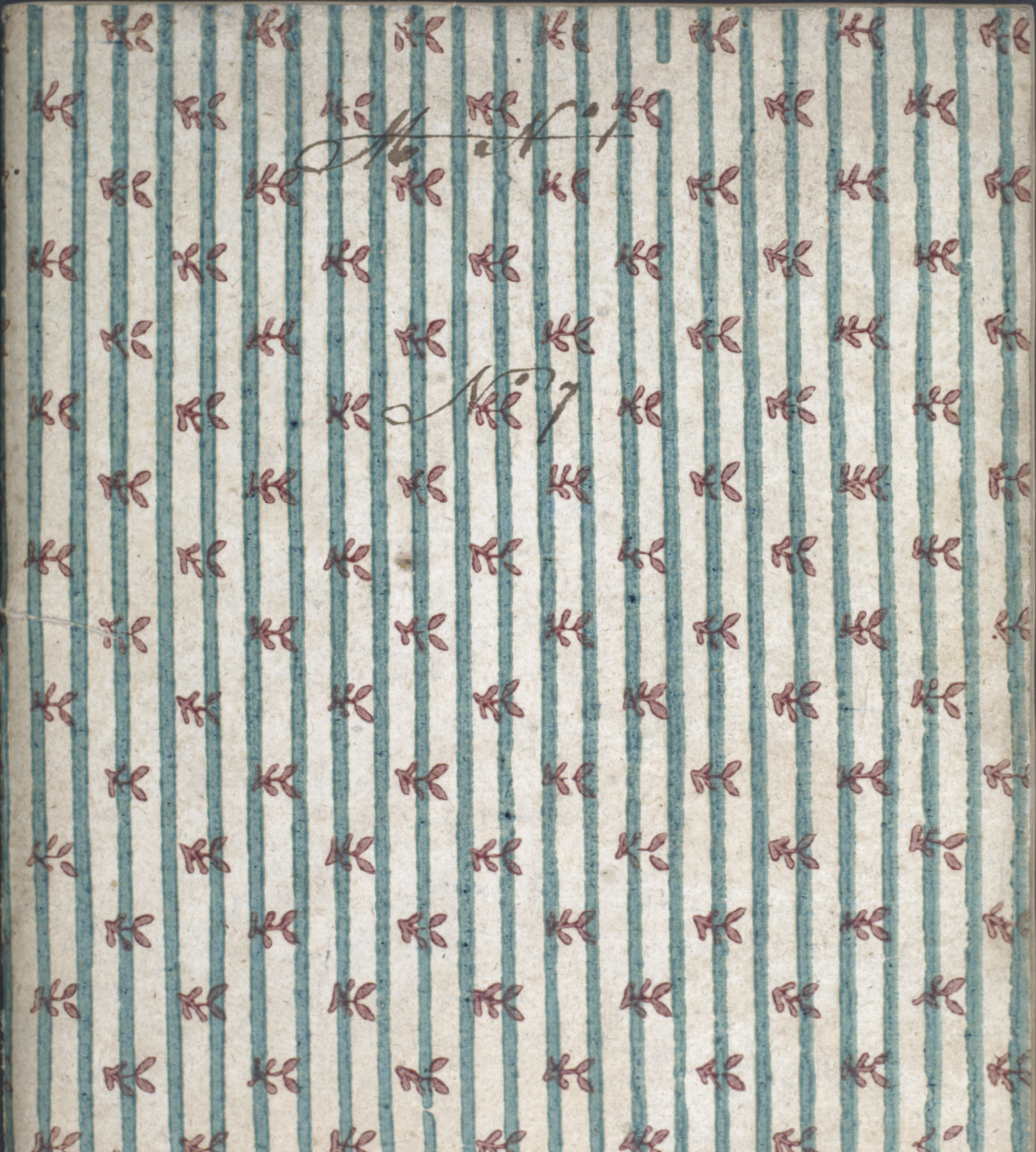

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Municipal Law
chap. V

1.

L. 15. I now proceed to the Consideration of municipal Law—that Rule by which a State or Nation is governed. It is thus defined by the learned Author of the Commentaries on the Laws of England "A Rule of civil Conduct prescribed by the supreme Power of the "State, commanding what is right and prohibiting what is wrong"+

+ Bl. 44. In my Observations upon Sir William Blackstone's Definition of Law in general, I ~~mentioned that he~~ did him the Justice to mention that he was not the first, and that he has not been the last, who has defined Law upon the same Principles, or upon Principles, similar, and equally dangerous. Here it is my Duty to mention, and, in one Respect, I am happy in mentioning, that he was the first, though I may add he has not been the last, who has defined municipal Law, as applied to the Law of England upon Principles, to which I must beg leave to apply the Epithets, dangerous and unsound. It is of high Import to the Liberties of the United States that the Seeds of Despotism be not permitted to lurk at the Roots of our municipal Law. If they shall be suffered to remain there, they will, at some Period or another spring up, and produce Abundance of pestiferous Fruit.—Let us, therefore examine fully and minutely the Extent, the Grounds, the Derivation, and the Consequences of the ~~[illegible]~~ the abovementioned Definition. "Legislature, we are told, is "the greatest Act of Superiority, that can be exercised by one Being over "another. Wherefore it is requisite to the very Essence of a Law, that it be "made by the supreme Power. Sovereignty and Legislature are indeed "convertible Terms; one cannot subsist without the other."= "There must "be, in every Government, however it began, or by whatever Right it "subsists, a supreme, irresistible, absolute uncontrolled Authority, in "which the jura summi imperii, or the Rights of Sovereignty, reside." "By sovereign Power is meant the making of Laws: For wherever that "Power resides, all others must conform to and be directed by it, what-"ever Appearance the outward Form and Administration of the Government

= Bl. 46.

2.

"vernment may put on. For it is at any Time in the Option of the "legislature to alter that Form and Administration, by a new "Edict or Rule, and to put the Execution of the Laws into whatever "Hands it pleases: And all the other Powers of the State must obey the "legislative Power in the Execution of their several Functions, or "else the Constitution is at an End.*" In the British Parliament "is lodged the Sovereignty of the British Constitution"." "The Power "of making Laws constitutes the supreme Authority=." "In the Bri-"tish Parliament," therefore, which is the legislative Power, "the supreme "and absolute Authority of the State is vested^." "This is the Place, where "that absolute despotic Power, which must, in all Governments re-"side somewhere is entrusted by the Constitution of these Kingdoms": "Its Power" ~~and Jurisdiction~~ and Jurisdiction "is so transcendent and absolute, "that it cannot be confined, either for Causes or Persons, within any "Bounds‡." "It can change and create afresh even the Constitution of the "Kingdom and of Parliaments themselves. It can, in short do every Thing "that is not naturally impossible". "What the Parliament doth, no Authority "upon Earth can undo†." "So long as the English Constitution lasts, we "may venture to affirm that the Power of Parliament is absolute and "without Control.#" ~~Hence~~ "Hence" "the known Apophthegm of the great Lord Treasurer Burleigh, that England could never be ruined but by a Parliament††." It is obvious that though this ~~Account of~~ Definition of municipal Law, and this Account of legislative Authority be ap-plied particularly to the Law of England and the ~~Parliament~~ legislature of Great Britain, yet they are, in their Terms and in their Meaning, extended to every other State or Nation whatever — "to every Government however "it began, or by whatever Right it subsists." Indeed the ~~Sentiments~~ Opinion of Mr Locke and other Writers, "that there remains still inherent in the "People, a supreme Power to remove or alter the Legislature", is consider-ed to be so merely theoretical, that "we cannot adopt it, nor argue from "it, under any Dispensation of Government at present actually exist-"ing."

* Bl. 48. 49.
" Bl. 51.
= Bl. 52.
^ Bl. 147.
‡ Bl. 160.
† Bl. 161.
# Bl. 162.
†† Bl. 161

The Doctrines contained in the foregoing Quotations from the Commentaries on the Laws of England, may be comprised under the

two

two general Propositions, which follow. 1. That in every State, there is and must be a supreme, irresistible, absolute, uncontrolled Authority, in which the Rights of Sovereignty reside. 2. That this Authority, and these Rights of Sovereignty must reside in the Legislature; Because "Sovereignty and Legislature are convertible Terms"; and because "it is requisite to the very Essence of a Law, that it be made by the supreme Power." In the first general Proposition, I have the Pleasure of agreeing entirely with Sir William Blackstone. Its Truth rests on this broad and fundamental Principle, ~~which has been already explained and illustrated at large~~ — that, by the Constitutions of Nature, Men and Nations are equal and free. In the second general Proposition I am under the Necessity of differing altogether from the learned Author of the Commentaries. I differ from him not only in the Opinion, that the foregoing Chain of reasoning must be applicable to every Government and to every System of municipal Law. I differ from him likewise in the Opinion, that the foregoing Chain of Reasoning can be justly applied even to the Government of Great Britain and to the municipal Law of England. I think I can safely pledge myself to shew that, in both, I differ from him on the most solid and satisfactory Grounds.

It deserves to be remarked that for his Definition of municipal Law, he cites the Authority of no English Court nor of any preceding English Writer, Lawyer or Judge. Indeed, so far as I know, he could cite no such Authority. So far as I have examined the English Law Books and Authorities, upon this important Subject; and I have examined them ~~as~~ as it has been my Duty to do — with no small Degree of Attention — this Definition stands entirely unsupported in Point of Authority. I may, however, be mistaken — I pretend not to have read, far less to remember every Thing in the Law: If I am mistaken; I will thank the friendly Monitor, that will advise me of the Mistake. As at present advised I can say, that, so far as I know, this Definition is unsupported by

by Authority in the English Law. I shall hereafter have Occasion to shew that, concerning ~~Acts of~~ the Acts of Parliament, to ~~which Acts or Sta-tutes~~ which the Definition is particularly applied, our Law Authorities hold, and even Parliament itself holds a very different Language.

The Introduction of the ~~Idea~~ Principle of Superiority into the Definition of Law in general, we traced, when we examined that Subject, from Sir William Blackstone to Baron Puffendorff. The Introduction of the same Principle into the Definition of municipal Law can be traced to the same Source. "Human Laws," says he, "are Nothing else, but the Decrees "of the Supreme Power, concerning Matters to be observed by the Sub-jects."† The celebrated Heineccius, in his System of Universal Law gives a Definition much to the same Purpose - "Civil Laws," says he, "are the Commands of the Supreme Power in a State."* Why was this Principle transplanted into the Law of England?

† Puff. b. 7. c. 6. s. 3. p. 688.

*2. Hein. s. 150 p. 152.

It deserves to be farther remarked, that, for all the strong Sen-timents and Expressions concerning the necessary Connexion and indeed the Convertibility of the sovereign and the legislative Powers, no Au-thority is produced from the English Law; and - I speak under the Guard as before - so far as I know, none could be produced. except in one Instance, of which I shall soon take Notice. The Observation, which I have already made with Regard to the Definition of municipal Law, may, therefore, be applied, with equal Propriety to the necessary Connexion between the sovereign the legislative Powers - This Connexion is not attempted to be ~~[illegible]~~ supported by Authority in the English Law. I excepted one Instance: It is this - "The Power and Jurisdiction of Parliament is so transcendent and "absolute, that it cannot be confined, either for Causes or Persons, with-"in any Bounds."‖ For this the Authority of my Lord Coke, in his fourth Institute is quoted. I have examined the Passage. It stands thus. "Of the Power and Jurisdiction of the Parliament, for making "of Laws in proceeding by Bill, it is so transcendent and absolute, "as it cannot be confined either for Causes or Persons, within any Bounds."※ ~~&c.~~ From this Authority, I think it may be fairly and justly inferred - that by the British Constitution the legislative Authority of that Nation, without any Exception of Causes or Persons, is vested ~~by the~~ in the British Parliament: In the same Manner, by the Constitution of Pennsylvania, the "legis-

‖ Bl. 160

※ 4. Ins. 36.

-lative

5 "lative Power of this Commonwealth is vested in a general Assembly: But can it be inferred ~~can it be inferred~~ from this Authority, ~~can it be inferred~~ that "~~the Power of making Laws constitutes the supreme Authority—cannot be~~ the "sovereign" ~~supreme~~ Power," of Great Britain is vested in her Parliament; ~~any more Can it from the~~ Can it be inferred from the Constitution of Pennsylvania, that her *sovereign* Power is vested in her general Assembly? — I think, therefore, I may now venture to say, that, both in this Definition of municipal Law and in his Opinion concerning the Convertibility of the legislative and the sovereign Authority, Sir William Blackstone stands unsupported by Authority. Is he supported by Reason and by Principle? By neither, in my humble Opinion.

The Discussion of this Question necessarily leads me to consider the Establishment of Government, and the Division of its Powers. That this Subject may be fully understood,—for, in the United States, it ought to be understood fully—I shall examine the Sentiments, which have been generally entertained and received concerning it, and then compare those Sentiments with ~~which~~ what I consider as the true State of Things. No sooner is Government mentioned than the fine flattering Images of Power, Dominion and Sovereignty dance in the Fancy as the beautiful and magnificent Effects of its Establishment. But the Truth is, that Sovereignty, Dominion and Power are the *Parents*, not the *Offspring* of Government. Let us, however, see what has been thought, and what ought to be thought concerning those splendid Objects. The Theory ~~concerning~~ of the Establishment of Government has been generally such as I am about to explain.

It has been supposed, that, if a Multitude of People, who had formerly lived independent of each other, wished to unite in a political Society, and to establish a Government, they would find it necessary to take the following Steps. 1. Each Individual would engage with all the ~~rest~~ others to join in one Body, and to manage, with their joint Powers and Wills, whatever should regard their common Preservation, Security and Happiness. In Consideration of this Engagement, made by each Individual with all the ~~rest~~ others,

all

all those others would engage with each Individual, to protect and defend
him from Injury, and to secure him in the Prosecution of every just
and laudable Pursuit. These reciprocal Engagements from each Individual
to all the others, and from all the others to each Individual form
the political Association. Those who do not enter into them are not considered
as a Part of the Society.

The Society being formed, some Measures must be taken in order
to regulate its Operations; otherwise the Society could never adopt or
pursue a System of Measures for promoting, jointly and effectually, the
public Security and Happiness. These Measures involve the Formation of
Government.

A Third Step, we are told, must also be taken, before Government
can be completed. In Addition to the Engagement of political Association
another Engagement must be made: To that Engagement there must be
a new Party. What he is — whence he comes — from what Source his equal and independent
Powers of contracting originate have never, ~~till~~ to this Moment,
been explained. Such an Account of him as I have received I will
give: If it is not satisfactory, you must not blame me. "This Party
+2. Burl. 28. "is one or more Persons, on whom the Supreme Authority is conferred+",
says one. By another we are told that this Party is one or more Persons
=Puff. 636. "on whom the Sovereignty is conferred=." ~~What is~~ This Sovereignty or supreme
How has it started up all of a sudden? Why does it make its first Appearance
Authority! Where do we find it originally?; for it must exist originally
in a derivative State?
before it can be conferred. To these we receive no explicit Answer.
We are told ~~sometimes~~ at one Time that "there are, in each Individual, the
"2. Burl. 42. "Seeds, as it were of the supreme Power"." We are told, more cautiously,
at another Time, that the voluntary Consent and Subjection of the
respective Members of the Society, is the "nearest and immediate Cause
°Puff. 651. "from which sovereign Authority, as a moral Quality results°." But, to
make the most of these different Pieces of Information ~~to~~ let us suppose
that this Cause will produce its proper Effects, that these Seeds will yield,
in due Time, their natural Fruits — and that this conferred Sovereignty
existed originally in those, who conferred it — What is this Sovereignty?
Is it divisible or indivisible? Was the whole or only a Part of it conferred?
Was it conferred unconditionally, or upon certain Conditions?
Was it conferred gratuitously or for a valuable Consideration? Why
was

hear we Nothing concerning these important Steps, which, upon the Opinion generally received, must have been taken previously to the complete Formation of a Government? This, I confess, is far from being satisfactory: Let us, however, take it as it is; and proceed to the ~~three Steps~~ remaining Step, which ~~we~~ are told, is taken for the complete Establishment of Government. This is an Engagement by those, who are to be the future Governours, that they will consult most carefully and act most ~~faithfully~~ honestly for the common Security and Happiness; and a reciprocal Engagement by those, who are, in future, to be governed, that they will observe Fidelity and Allegiance to those invested with the sovereign Authority.

It is admitted not to be probable that, in the Formation of the several Governments, these three Steps have been actually and regularly taken; yet, we are told, in every just Institution of Power there must have been such Transactions as implicitly contain the full Force and Import of all of them.+

+2. Hutch. 227.

That the two first Steps have been sometimes taken, and must be always supposed, in the regular Structure of a Government, I readily agree; because it is not easy to discover how a Government could be formed without them. But with Regard to the third, I see no Necessity for it: I see no Propriety in it. It is derogatory, in my humble Judgment, from the genuine Principles of legitimate Sovereignty, and inconsistent with the just Theory, and ~~what ought to be the~~ best Exercise ~~Practice~~ too of supreme Power. But the full Illustration of these dignified Subjects is reserved for another Place.

With Regard, however, to the British Constitution we must allow the Supposition that a Contract took Place at its Establishment. For this we have ~~the~~ highest political Authority. A full Assembly of the Lords and Commons, met in Convention in the Year 1688 declared that James the second had broke the original Contract between the King and People." What ~~that~~ the Terms of that Contract were, at

" Bl. 211. 212

what

what Time it was made, and ~~upon~~ what ~~Conditions were~~ Duties it ~~prescribed~~ enjoined, have been Subjects of dark and doubtful Disputation. For this Reason, as we are told by Sir William Blackstone it was, after the Revolution, judged proper to declare these Duties expressly and to reduce that Contract to a plain Certainty. So that, whatever Doubts might be formerly raised, by weak and scrupulous Minds about the Existence of such an original Contract, they must now entirely cease; especially with Regard to every Prince, who has reigned since that Revolution.+

+ Bl. 233.

But, after all, what will this prove with Regard to the supreme Power of Parliament? Do we hear, in the British Constitution, of any Contract between them and the People. How came they to be invested with such immense Authority? The usual Theories of Government support no Hypotheses of this Kind, even with in Favour of the British Legislature; far less, in Favour of the Legislature of every other Government "however formed, or by whatever Right subsisting".

Let us trace this Matter a little farther: Let us endeavour to form some just Conceptions concerning this supreme and Sovereign Power, concerning which so much has been said, and concerning which so little has been said justly. Let us turn our Eyes, for a while, from Books and Systems: Let us fix them upon Men and Things. While those, who were about to form a Society, continued separate and independent Men, they possessed separate and independent Powers and Rights. When the Society was formed it possessed jointly all the previously separate and independent Powers and Rights of the Individuals who formed it, and all the other Powers and Rights which result~~ed~~ from the social Union. The Aggregate of these Powers and of these Rights, ~~is, in~~ composes, in my humble Opinion, the Sovereign ~~and supreme Power~~ty of the Society or Nation. In the Society or Nation, this Sovereignty originally ~~resides~~ exists. For whose Benefit does it ~~reside there~~ exist? For the Benefit of the Society or Nation. Is it necessary for the Benefit of the Society or Nation, that, the Moment it exists, it should be transferred? This Question ought undoubtedly to be seriously

seriously considered, and to be resolved on the most solid grounds in the Affirmative, before the Transfer is made? Has this ever been done? Has it ever been evinced, by unanswerable Arguments, that it is necessary to the Benefit of a Society to transfer all those Rights and Powers and the Results of all those Rights and Powers, which the Members once possessed separately, but which the Society now possess jointly? I think such a Position has never been ~~evinced~~ to be true. Those Powers and Rights were, I think collected to be ~~used~~ exercised and improved not to be alienated and lost. All those Powers and Rights, indeed, cannot in a numerous and extended Society be ~~used~~ exercised personally; but they may be exercised by Representation. One of those Powers and Rights is to make Laws for the Government of the Nation. This Power and Right may be delegated for a certain ~~Time~~ Period, on certain Conditions, under certain Limitations and to a certain Number of Persons. I ask — Is it necessary that, ~~for this Purpose, the only~~ along with this Power and this Right, all the other Powers and Rights of the Nation should be delegated to the same Persons? I ask farther — is it necessary that all those other Powers ~~and~~ Rights should be delegated without any Right of Resumption? ~~One~~ Another of those ~~other~~ Powers and Rights is that of carrying the Laws into Execution? May not the Society delegate this Right for another Period, on other Conditions, on other Limitations and to other Persons? ~~Must all the Rights and Powers of the Society be irrevocably vested in the Legislature? Can no Executive Authority, independent of that, be delegated.~~ A third Right and Power of the Society is that of administering Justice under the Laws. May not this Right be delegated for still another Period, on still other Conditions, under still other Limitations, and to still other Persons? Or may not this Power and Right be partly delegated, and partly retained in personal Exercise? or ~~this may be done~~ in the ~~largest~~ most extended Commonwealths an important Part of the Administration of Justice may be discharged by the People themselves. All this certainly may be done. All this certainly has been done, as I shall have the Pleasure ~~and the Pride also~~ of shewing, when I come to examine ~~particularly~~ the American Governments, and to point out, by an Enumeration

and

and Comparison of Particulars, how beautifully, how regularly

^^^ Reservation

and how usefully ~~those Principles have~~ we have established by our Practice ~~in this Country,~~ Principles, concerning the Distribution, the Arrangement, ~~the Deposition~~ the Direction, and the ~~Limitation~~ Lim.; of which ^ even the ~~first~~ Theory is still unknown in ~~others~~ Nations; ^ of that public ~~Power~~ Authority

Let us now pause and reflect — After what we see can be done — after what we see has been done in the Delegation and Distribution of the Rights and Powers of Society — can we subscribe to the Doctrine in the Commentaries — that the Authority which is legislative must also be supreme — can we consent that this ~~Principle~~ Doctrine should form a ~~Part~~ first Principle in our System of municipal Law? Certainly not. This Definition is not calculated for the Meridian of the United States.

I go farther — It is not calculated for the Meridian of Great Britain. In order to ~~do~~ shew this, as it ought to be ~~done~~ shewn, it will be necessary to ~~descend~~ enter into ~~an Examination~~ a Disquisition concerning the component Parts and Powers of the British Parliament and the Origin ~~and~~ Kinds and Properties of the English ~~Law~~, municipal Law, the greatest and best Proportion of which was never made by a Parliament at all.

The British Parliament consists of three distinct Branches, the King, the House of Lords, and the House of Commons. To that Species of English Law, which is called a Statute, the Assent of all the three Branches ~~Lords and the [illegible]~~ is necessary. When it has received the Assent of all the three, it becomes a Law and is obligatory upon the Nation; but it is obligatory upon different Parts of it for different Reasons. "An Act of Parliament, says my Lord Hale, is made, as it were, a Tripartite Indenture between the King, the Lords and Commons; for without the concurrent Consent of all those three Parts of the Legislature, no such Law is or can be made.+ What is an Indenture? The Commentaries will tell us, that it is a Species of Deed, to which there are more Parties than one: What is the first Requisite of a Deed? The Commentaries will also tell us," that there be Persons able to contract, and be contracted with. If a Deed is a Contract or Agreement; if an Indenture is a Species of Deed, to which there are more Parties than one; if an Act of Parliament may be called an Indenture tripartite because there are three Parties to it — the King, the Lords and the Commons; we find that an Act, which ^ considered indistinctly ~~is~~ dignified by the Name of Law, requires the

+Hales Hist. 2.

" 2. Bl. 295

whole

whole supreme Power of the Nation to give it Birth, is when viewed more closely and analised into the component Parts of its Authority, ~~is~~ properly arranged under the Class of Contracts; it is a Contract, to which there are three Parties; ~~one of~~ those who constitute one of the three Parties, not acting even in public Characters. A Peer represents no one; he votes for himself; and when he is absent, he may transfer his Right of voting to another. This may be thought a very ~~familiar~~ free Way of treating what is represented as necessarily an Emanation of sovereign ~~supreme~~ Authority; but it is treating it truly. And, give me Leave to add, it is treating it accurately. Besides; I shall not be ashamed of treading in a Path, though even a Foot Path, to which ~~the Law~~ I am directed by the Finger of the enlightened Lord Hale. That Path, to which he points, will lead to Instruction: Let us pursue it. To this Indenture, there are three Parties: To an Indenture the Power of contracting in each of the Parties is necessary: What is the Power of contracting in the different Parts? The King contracts for himself, and as representing the executive, ~~and in some Instances too, the~~ Authority of the Nation. The Peers engage in their private and personal Rights: ~~The~~ Members of the House of Commons bind themselves and those whom they represent. They represent, or are supposed, ~~to represent~~ — how justly is immaterial to our present Argument — to represent "all the Commons of the whole Realm†." ~~Every one~~ We all know that a ~~Person~~ man may execute an Instrument either in Person, or by an Attorney: We also know that ~~the same~~ an Instrument may be executed by a Person in his own Right and as Attorney also. The foregoing, though ~~This may be represented as~~ a very familiar, ~~but I think,~~ I think must be admitted to be a very intelligible and satisfactory Illustration and Analysis of the Manner, in which Acts of Parliament, are made and become obligatory. For my own Part, I cannot conceive how the real Truth or the Dignity of a Subject can suffer by being closely inspected. When the Exclamation — procul este — is made, I am led to suspect that a secret conscious Want of Dignity or Integrity is the Cause. The plain and simple Analysis which I have given, of the Nature and Obligation of Acts of Parliament, is evidently countenanced by the expressive legal Language of my Lord Hale. It is supported and confirmed by the very respectable Authority of my Lord Hardwicke. "The binding Force" — I use his very Words, as they are reported — "the binding Force of these Acts of Parliament arises from that Prerogative, which is in the King, as our sovereign Liege Lord; from that personal Right, which is inherent in the Peers and Lords of Parliament to bind themselves

"and

† 4. Ins. 1.

"In the Lords House in our Parliaments, the Peers have usually deputed some of their fellow Members to be their Proxies that is to have *their Votes*; and which Way the Proxy in his Judgment holds fit to give his own Suffrage, and *his also*, for whom he is Proxy, so many Votes are given in that Opinion. But this is a Privilege and Usage peculiar only to the *Peers* of England who sit in their own Right, and, as *Coke* observes, + for themselves only. But in the House of Commons, no Man can make a Proxy, because they represent others, and are, in Effect, but Proxies or Deputies themselves. Much less can those who have Votes in the Election of Knights, Citizens and Burgesses for the Parliament, depute that Right and Privilege to another; but must be present at the Election, and give their Suffrage themselves, if they will have the Benefit thereof allowed to them, for whom they give it"

+ 3. C. 1. in communi domo parliament. per Coke

" Whit. 390.

1. Perhaps it would not be improper if, on some Occasions, at least, the Forms as well as the Principles of private, were copied into public Transactions. Permit me to mention an Instance, in which this was lately done. In the Ratification of the Constitution of the United States by the Convention of Pennsylvania, the distinct Characters, in which the Members of that Convention acted, are distinctly marked. The Instrument is in these Words "We the Delegates of the People of the Commonwealth of Pennsylvania, ~~who~~ in general Convention assembled, do, in the Name and by the Authority of the same People, and for ourselves assent to and ratify the Constitution for the United States of America."

" and their Heirs and Successors in their Honours and Dignities; and
" from the delegated Power vested in the Commons, as the Repre-
-sentatives of the People; and therefore Lord Coke says 4. Ins. 1.
" these represent the whole Commons of the Realm, and are trusted
" for them. By Reason of this Representation, every Man is said to be a
" Party to, and the Consent of every Subject is involved in an Act of Parliament." +A

+2. Atk. 654.

What is there, in all this, that necessarily implies the ~~[illegible]~~ irresistible Energy
of ~~[illegible]~~ Power, ~~that~~ which is sovereign and supreme, without Limits and
without Control? We have already seen all the Parties to an Act of Parliament.
Let us, again, take a deliberate and distinct View of them: Where shall we find this sove-
-reign and supreme Power? In the King? — It is true that he is called by my
Lord Hardwicke "sovereign liege Lord" and that his Prerogative as
such, is assigned, and with much Propriety, as one of the Sources from
which "the binding Force of Acts of Parliament arises" The legal and
constitutional Import of the Expressions, Sovereign liege Lord, is well
known. They present the King to his Subjects as the Object of their Al-
-legiance: They present him to Foreigners as exercising the whole
Authority of the Nation in foreign Transactions. In foreign Transactions
the British Parliament is no Party. To foreign Nations the British
Parliament is totally unknown. Alliances, Treaties of Peace, even De-
-clarations of War are made in the Name and by the constitutional
Authority of the King alone. But it never has been pretended that
the Prerogative of the King, as Sovereign liege Lord, extended so far
as to bind his Subjects by his Laws. Even Henry 8. Tyrant as he
was, knew that an Act of Parliament was necessary, if even that could
be sufficient, to endow his Proclamations with legal obligatory Force.
But the King, by assenting to an Act of Parliament, can bind himself;
and he can bind all that Portion of the sovereign Power of the Nation,
which is entrusted to his Management and Care. ~~In the King, therefore~~
And it is certainly proper that, as he represents the executive and the
foreign Power of the Nation, he should be consulted in the making of the
national Laws. From this short and clear Deduction we evidently
see that the absolute uncontrolled Power, mentioned by Sir William
Blackstone as inseparable from legislative Authority, is not to be found in
the King. Is it to be found in the House of Lords? That will not be pre-
-tended. Their Votes bind not a single Person in the Nation, except
themselves

L. 17.

A.

Every Man in England, says the Author of the Commentaries himself is, in Judgment of Law, Party to the Making of an Act of Parliament, being present thereat by his Representatives.+

+ Bl. 185.

themselves, and the Heirs and Successors of their Honours and Dignities. Let us go to the House of Commons: Is this supreme Power which elsewhere we have searched for in vain, to be found among the Members of that House? In what Character? As ~~Individuals~~ in their own Right? This will not be alleged. As Representatives? ~~If so, this supreme Power cannot be found among them; it must be found among their Constituents.~~ As Representatives, ~~the Members of the House of Commons act by the Authority~~ they act not by their own Power, but by the Power of those whom they represent. This Power, therefore, whatever it is, cannot be found among the Members of the House of Commons, it must be looked for among their Constituents. There indeed, we shall find it. And the Moment we find it we shall discover its Nature and Extent. The King and the Commons assembled in Parliament are ~~empowered~~ intrusted by the whole Nation; except the House of Lords who act in their own Right ~~of [illegible]~~ not with "transcendent and absolute Power and Jurisdiction" generally, as one would naturally conclude from the unqualified Expression of Sir William Blackstone; but with this "transcendent and absolute Power and Jurisdiction for making of Laws" as we find in the determinate Language of ~~Sir Edward~~ my Lord Coke. ~~In their legislative Character~~ To the Making of Laws this Power and Jurisdiction of the British Parliament is strictly and rigidly confined. A single Law the British Parliament cannot execute. In a single Cause, the British Parliament cannot administer Justice. Why then should "absolute despotic Power, to use the Language of the Commentaries, be ascribed to the British Parliament? Has this Doctrine a solid Foundation? I presume it has not. But though it has not a solid Foundation; it has produced, as I shall hereafter shew, the most pernicious Effects. I will acknowledge freely that the Bounds, which circumscribe the Authority of the British Parliament are not ~~marked with~~ sufficiently accurately: I will acknowledge farther, that they are not ~~guarded with~~ sufficiently strongly. But can this suggest a Reason or a Motive for denying their Existence? It strongly suggests, indeed, Reasons and Motives of a very different Kind. It suggests the strongest Reasons and Motives for circumscribing the Authority of the British Parliament by Limits more accurate ~~and~~ for fortifying those Limits with an additional Degree of Strength. and for rendering the Practice more conformable than it now is, to the ~~[illegible]~~ If any Thing ~~[illegible]~~: The-ory of its Institution – for rendering the House of Commons, in Fact, what it ~~is~~ coming it is ~~supposed~~ presumed to be in Law – "A Representation of all the Commons of the whole Realm."

~~proceeding~~ coming from this Chair could be supposed, by Possibility, to produce the smallest Effect in that Nation; I would warmly recommend to it the Accomplishment of those great Objects, as Consummations most devoutly to be wished. The Maxim of the great~~ly~~ lord Burleigh has prevailed long enough: Let it make Way for a better. Instead of saying that "England can never be ruined but by a Parliament"; let it be said and truly said that "England can never be ruined but by herself."

~~In my Observations upon [illegible]~~ ~~of the Distinction made by~~ the learned Author of the Commentaries distinguishes between a Law, and or Compact ~~[illegible]~~; and also between a Law, and ~~a Counsel or Advice~~ and an Agreement. ~~I then [illegible]~~ ~~that~~ I ~~would~~ will examine ~~farther~~ the Principle of these Distinctions, in order that its Strength or Weakness ~~might~~ may appear. ~~[illegible] Plan for the Examination~~. It will be necessary to ~~repeat~~ mention what is said in the Commentaries upon this Subject. "Municipal Law is called a Rule, to distinguish it from Advice or Counsel, which we are at liberty to follow or not, as we see proper, and to judge upon the Reasonableness or Unreasonableness of the Thing advised: Whereas our Obedience to the Law depends not upon our Approbation, but upon the Maker's Will. Counsel is only Matter of Persuasion: Law is Matter of Injunction: Counsel acts only upon the willing: Law, upon the unwilling also."

"It is also called a Rule, to distinguish it from a Compact or Agreement: For a Compact is a Promise proceeding from us: Law is a Command directed to us. The Language of a Compact is, "I will, or will not, do this: That of a Law is "thou shalt, or shalt not, do it." It is true there is an Obligation which a Compact carries with it, equal, in Point of Conscience, to that of a Law; but then the Original of the Obligation is different. In Compacts, we ourselves determine and promise what shall be done, before we are obliged to do it: In Laws, we are obliged to act, without ourselves determining or promising any Thing at all."+

+Bl. 44. 45.

The ~~Examination~~ Examination of this Principle, which lies at the Root of these Distinctions is an interesting Subject indeed

indeed. If these Distinctions can be supported, we may bid a last ~~Farewell~~ Adieu to a Maxim, which I have always deemed to be of prime Importance in the Science of Government and human Laws – A free People are governed by Laws, of which they approve. Before we part from this darling Position, let us, at least cast behind us, a "longing, lingering look".

Upon these Passages of the Commentaries I make Remarks similar to those, which I made upon the Passages examined some Time ago. No Authority in the English Law is adduced – none, so far as I know, could be adduced to support them. These Sentiments concerning Law, as well as the Definitions of municipal Law, and Law in general, may be traced to the Performance of Baron Puffendorff. Let us see what this Performance says. "Law differs from Counsel in this, that by the latter, a Man" "has no proper Power, so as to lay any direct Obligation on another; but must leave it to his Pleasure and Choice whether he will follow the Counsel, or not;" "but Law, though it ought not to want its Reasons, yet these Reasons are not the Cause why Obedience is paid to it, but the Power of the Exactor, who, when he has signified his Pleasure, lays an Obligation on the Subject to act in Conformity to his Decree." "We obey Laws, not principally upon Account of the Matter of them, but upon Account of the Legislator's Will." And thus "Law is the Injunction of him who has a Power over those to whom he prescribes: but Counsel, comes from ~~of~~ him, who has no such Power." "Counsel is only given to those, who are willing to have it; but Law reaches the unwilling.+"

+ Puff. 56.

"Neither are those Accounts accurate enough in their Expressions, who frequently apply to Laws the Name of common Agreements." "The" "Points of Distinction between a Compact or Covenant and a Law, are obvious. For a Compact is a Promise, but a Law is a Command. In Compacts, the Form of Speaking is, I will do so and so; but in Laws the Form runs, do thou so, after an imperative Manner. In Compacts, since they depend, as to their Original, on our Will, we first determine what is to be done, before we are obliged to do it; but in Laws, which suppose the Powers of others over us, we are, in the first Place obliged to act, and afterwards the Manner of acting is determined. And therefore he is not bound

by

by a Compact, who did not freely tie himself by giving his Consent; but we are, for this Reason, obliged by a Law; because we owed an antecedent Obedience to its Author+."

+ Puff. 57.

You now see that these Distinctions between a Law and an Agreement, a Law and a Compact are adopted from Baron Puffendorff: Whence he derived them, it is immaterial to enquire. But it is material to shew ~~that~~ as I think I can do unanswerably, that these Distinctions, if they could be supported, would overturn the beautiful ~~[illegible]~~ Temple of ~~the~~ Liberty from ~~to~~ its very Foundations. ~~[illegible]~~ It is material also to shew, as I think, I can do unanswerably, that this fair Temple of Liberty stands unshaken and undefaced; and that the sole legitimate Principle of Obedience to human Laws is human Consent. This Consent may be authenticated in different Ways: In its different Stages of Existence, it may assume different Names — Approbation — ~~Assent~~ — Ratification — Experience. But in all its different Shapes — under all its different Appellations, it may easily be resolved into this Proposition simple, natural and just — All human Laws should ~~[illegible]~~ be founded on the ~~Will~~ Consent of those, who obey them. This great Principle I shall, in the Course of these Lectures, have Occasion to follow in a thousand agreeable Dir- ~~I shall not follow it [illegible] of all legitimate Government [illegible]~~ -rections. My present Business, while I examine the Principles of municipal Law as delivered in the Commentaries, ~~trace it in different Forms through the Governments established in the United States~~ is to apply them and the Examination of them to the Laws of England. In that Law, we shall find the Stream of Authority running from the most early Periods, uniform and strong in the Direction of the Principle of Consent — ~~Original~~ Consent given originally — Consent given in the Form of Ratification — and — what is most Satisfactory of all — Consent given after long approved and uninterrupted Experience. the most salutary Principle of Obedience to human Laws, that ever was discovered among Men. This last, I think, is the Principle of the Common Law. With such a Byzantium before him, is it not astonishing, indeed, that the Attention — must I say the Attachment? — of Sir William Blackstone should have been attracted towards a Chalcedon*?

* Tac. An. XII. 62.
2. Gib. c. 17. p. 5. 4to.

A. Let us next pay the ~~affection~~ respect, which is due to ~~[illegible]~~ the celebrated Sentiment of the English Justinian Edward I. Lex justissima, ut quod omnes tangit, ab omnibus approbetur. It is a most just Law, that what affects all should be approved by || all. This golden ~~Maxim~~ Rule is with great Propriety inserted in his Summons to his Parliament. The Lord Chancellor Fortescue, in his

|| El. Jur. 50

A. I hold it both needless and fruitless, says Mr Selden ~~says Bacon in his Discourse on Government~~, to enter into the Lists concerning the Original of the Saxons. They were a free People, governed by Laws made by the People, and therefore called a free People, because they were a Law to themselves, and this was a Privilege belonging to all the Germans. De majoribus omnes consultant.+ + N. Bac. 9.

The ancient Coronation Oath of the Kings of England obliged them, to the utmost of their Power, to cause those Laws to be observed, "which the Men of the People had *made* and *chosen*." a 1 Bl. 236.

a "que lez gentez du people avont faitez et esliez."

his most excellent Tractate concerning the English Laws, informs his royal Pupil, that the "Statutes of England are framed, not *by the Will of the Prince*, but that and by by the Assent of the whole Kingdom". Angliæ Statuta, nedum Principis voluntate, sed et totius Regni assensu, ipsa conduntur. See Mil. 305.306.307 And if a Statute, though passed with the greatest Caution and Solemnity, should be found, on Experience, not to reach those Purposes, which were intended by its Framers; it can soon be reformed; but not without the same Assent of the Peers and Commonalty of the Kingdom, from which it originally flowed. Et si Statuta hæc tanta solemnitate et prudentia edita, efficacia tanta, quanta conditorum cupiebat intentio, non esse contingant, concito reformari ipsa possunt; et non sine communitatis et procerum regni illius assensu, quali ipsa primitus emanarunt.+ + Fortesc. c. 18.

"To an Act of Law, Statute or Common, every Man, says Ld Chief Justice Vaughan, is as much *consenting*, and more *solemnly*, than he is to his own private Deed". Vaugh. 392. Authorities to the same Purpose might, without End, be heaped upon Authorities from the Law-Books. I forbear to trouble you with any more of them. Let us have Recourse to what I may properly call a perpetually standing Authority upon this very important Subject—the Writ ~~by which the~~ for summoning a Parliament ~~is summoned to attend~~. It commands the Sheriff of each County to cause two Knights, the most fit and discreet of the County, and two Citizens from every City, and two Burgesses from every Burrough within the County, to be chosen according to Law: "So that the said Knights have full and sufficient Power for *themselves* and the *Commonalty of the said County*, and the said Citizens and Burgesses for *themselves* and the *Commonalty of the said Cities and Burroughs, severally from them*, to *do* and *consent* to those Things, which, by the Favour of God, shall happen to be ordained by the common Council of the Kingdom. So that for Default of such *Power*, or through *improvident* Election of the said Knights, Citizens or Burgesses, the said Affairs remain not undone." Whit. 2.3. Can Language be more explicit to shew the Principle upon which Acts of Parliament *must* be made, and consequently the Principle, upon which alone they ought to be *obeyed*. It is directed that the Members have full and sufficient Powers *for themselves*, and for their Constituents *from their Constituents*. This is precisely according to the *Analysis*, which we have already given of the Power of Parliament. Why are those Powers necessary? To *do* and *consent* to those Things which shall be ordained by Parliament. Those

Powers

a It is the Wisdom of ~~our~~ the English Law, that Acts of Parliament are equally
binding to the *Makers of them*, as to the rest of the People. The
Makers ~~are not exempt from the Force of those Laws, which~~
~~are made by them. They~~ are empowered *for themselves*
as well as for their Constituents, and *themselves* as well
as their Constituents must taste the sweet or bitter Fruits
of *their own* ~~Consultations~~ Works. This suggests a powerful
Motive for Caution and Justice in their Determina-
tions.+ But this Doctrine ill agrees with the *new* and + 2. Whit. 87.
foreign Theory introduced into the Commentaries
"A Law *always* supposes some *Superior who is to*
make it" " Bl. 43.

b. It is a great Trust reposed in Members of Parliament to
to have the Power of the whole Commonalty of a County
or City or Burrough conferred on them. The Acts of
the Members are the Acts of *the Commonalty from whom*
* they have *their* Power, and who are bound by them. 2. Whit. 89.

Powers are absolutely necessary: for without them the Business of the Nation would remain undone. Is it possible that any one who has ever seen this venerable and authentic legal Instrument, could suppose that the sovereign Power of the Nation was vested in the Parliament of Great Britain? Is it possible that one who has seen this Writ, could forget the Rock, from which the Members were hewn, and the Hole of the Pit, from which they were dug? The humble Servants, who must come furnished with "full and sufficient Power from" their Masters "the Commonalty of the County, and the Citizens and Burgesses separately ~~respectively~~"; "Divisim" one by one— have those humble Servants, when assembled together, the uncontrolled Powers of the Nation in their Hands? When they are intrusted with the legislative; may they, therefore, assume also the executive and the judicial Powers of their Country?

We now see, in a very striking Point of View, the strong and expressive Import of the Language of my Lord Hale, when he says that an Act of Parliament is, as it were, a tripartite Indenture between the King, the Lords and the Commons. They form three Parties: Each Party has Power to contract. The King contracts in his own Right— for a King is also a Man,—and in Consequence of the Powers devolved on him by that original Contract, long supposed, but at the Revolution of 1688 expressly recognized to have been made between him and the People. The Lords of Parliament contract solely in their own Right. The Members of the House of Commons contract in their own Right, for themselves, and in Right of their Constituents, for the Commonalty of the whole Realm. Thus, we find every Party and every Power, necessary to form a Contract or a Compact, or an Agreement, for these Terms are synonymous— in

The vital Principle of every Contract is the Consent of the Mind

the strictest and most proper Sense of the Words. My Lord Hale did not draw ~~his Sentiments concerning~~ the obligatory Principle of an Act of Parliament from a foreign Fountain. He drew it, ~~from its native Springs, flowing~~ pure and clear, from its native Springs.

Sir William Blackstone tells us that the Original of the Obligation, which a ~~Contract~~ Compact carries with it is different

+ Bl. 45

-ferent from that of a Law.+ The Original of the Obligation of a Compact we know to be Consent: The Original of the Obligation of an Act of Parliament we have traced, minutely, to the very same Source. To what other Original would the Author of the Commentaries refer it? He says, that "in Laws we are obliged to act, without ourselves determining or pro-

" Bl. 45.

-mising any Thing at all." What the Obligation is, and from what Original it comes, is not, so far as I have found explained.

It is in add- they are not the principal

But Acts of Parliament are not the only Species of Law known and obligatory in England. That Kingdom boasts in the Common Law. In the Countenance of that Law, every lovely Fea-ture beams Consent. This Law, we have the Pleasure of saying in the Language of the Commentaries, receives its binding Power, and the Force of Law, by long and immemorial Usage, and by its universal Recep-

Bl. 64.

-tion throughout the Kingdom. This Law is of vast ~~Extent~~ Importance. By it the Proceedings and Decisions of Courts of Justice are regulated and di-rected. It guides the Course of Descents and Successions to real Estates, and limits their Extent and Qualifications: It appoints the Forms and Solemnities of acquiring, of securing and of transferring Property: It pre-scribes the Manner and the Obligation of Contracts: It establishes ~~the~~ Rules, by which ~~Wills~~ Contracts, Wills, Deeds and even Acts of Parlia-

‡ Hale Hist. 24.

-ment themselves are interpreted‡. This Law is founded on long and ge-neral Custom. A Custom that has been long and generally observed (neces-sarily carries with it intrinsic Evidence of Consent. Nothing ~~but~~ could introduce it, but Consent: Nothing could extend it but Consent. No-thing could continue it, but approved Consent. Caution and Prudence are universally recommended in the Introduction of new Laws: Can Cau-tion and Prudence be so strongly exemplified - can their Fruits be so certainly reaped in any other Laws as in those that are established by Custom. The Prospect of Convenience invites to the first Experiment: A first Experiment, successful, encourages to make a second. The successful Experiments of one Man or one Body of Men induce another Man or another Body of Men to venture upon similar Trials. The In- ~~Experien-~~ stances, are multiplied ~~ence strengthened~~ and extended till, at length, the Custom ~~it~~ becomes universal and established ~~and~~ Can a Law be made in a Manner more eligible? Experience, the faith- ~~Other Laws Laws be made in another Manner~~ -ful Guide of Life and Business, attends it in its every Step. ~~All other Laws~~ Other ‡ ~~to~~

Other Laws demand

20. be taken upon trust: A good Countenance is them ~~[illegible]~~ only Recommenda-
-tion. Those who introduce them ~~it~~ can only say in their Favour ~~[illegible]~~ that they look ~~[illegible]~~
well A ~~[illegible]~~
~~[illegible]~~
~~[illegible]~~
~~of a Law introduced by Custom~~. The same Means, by which
the Character of one Law is known and approved, are employed
to try and discriminate the Character of every other. In Favour of
every one that is recommended it can be said, not only that it has
lived unexceptionably by itself, but also that it has lived in ~~peacefully~~
and Harmony ~~amicably~~ with all the others. In this Manner, a ~~[illegible]~~
approved and unconflicting System of Laws is gradually though slowly collected, and formed.
By a Process of this Kind, the immortal Newton collected arranged
and formed his just and beautiful System of experimental Philoso-
-phy. By the same Kind of Process our Predecessors and Ancestors have
collected arranged and formed a System of experimental Law, equally
just, equally beautiful – and – important as Newton's System is – far
more important still. ~~From this System we have derived our~~ This
System has stood the Test of numerous Ages: ~~To every~~ Age it has disclosed new Beau-
-ties and new Truths. In Improvement it is yet ~~still~~ Progressive ~~still~~ and what has
been said been said ~~poetically on another Occasion~~, may be said in the
strictest Form of Asseveration ~~affirmation in~~ this – it acquires Strength in its Pro-
-gress. From this System we derive ~~receive~~ our ~~best~~ Birthright and richest ~~noblest~~
Inheritance. The Rev. the Progress ~~Ext~~ its History and ~~the~~ Extension, the ~~History~~ ~~com-~~ to America and ~~the~~
-ponent Parts of this System; invaluable ~~of~~ it will be my Duty and my Pleasure ^^
to trace and to exhibit in the Course of these Lectures. My present Business
is to ascertain the Origin of its obligatory Force. Surely this may be
done with Ease. The Common Law is founded on long and general
Custom. On what can long and general Custom be founded? Un-
-questionably on Nothing else, but free and voluntary Consent.
The Regions of Custom afford a most secure Asylum from the
Operations of absolute Despotic Power. To the cautious ~~slow and~~ gra- every prospect,
-dual and tedious Probation, which a Law originating from Custom must
undergo, a Law darted from Compulsion will never submit.
Sic volo sic jubeo, stet pro ratione voluntas is the Motto of
Edicts, proclaimed ~~published~~ ~~Laws, published in~~ ~~announced~~, in Thunder, ~~from~~ by the Voice of a human
Superior. How dissimilar are the Sentiments expressed in calm ~~[illegible]~~ and
placid

^^^ ~~peculiar to ourselves~~

~~^^ only upon Trust, and claim not to be consider-~~
~~-ed as that of~~

L. 18.

^^ Principles of its Esta-
-blishment in the se-
-veral States and in the
national Government

A. A customary Law, with a Modesty appropriate to conscious Merit, asks for Admittance only upon Trial; and claims not to be considered as a Part of the political Family, till she can establish a Character, founded on a long and intimate Acquaintance

I never intruded upon you. I was invited upon Trial. The passed Assent, by a customary Law. You have long known me— that has been had ~~I have never intruded~~. You have long approved me. Shall I now obtain an Establishment in your Family? A customary Law carries with it the most unquestionable Proof of Freedom in the Country, which is happy enough to be the Place of its Abode.— Some Truths are too plain to be proved— That a Law, which has been established by long and general Custom must have received its Origin and Introduction from free and voluntary Consent, is a Position that must be evident to every one, who understand the Force and Meaning of the Terms, in which it is expressed. My object is to _imprint_ as well as to _prove_ this great political Doctrine. Perhaps this cannot be done better, than by laying before you the Sentiments, which an English Parliament held upon this Subject, above two hundred years ago. You will see how strongly they support the Principle— that the Obligation of human Laws arises from _Consent_. The Sentiments were expressed on an Occasion similar to one, which will still suggest Matter of very interesting Recollection to many Minds.— They were expressed when an Attempt was made to establish, in England, a foreign Jurisdiction. With becoming Indignation against it, the Parliament declare— "This Realm is free from Subjection to any Man's Laws, but only to such as have been _devised_, made and obtained within this Realm, for the Wealth of the same; or to such other as ~~the~~ by Sufferance of your Grace and your Progenitors, the People of this your Realm have taken at their _free Liberty_, with their _own Consent_ to be _used_ amongst them, and have _bound themselves_ by _long Use_ and _Custom_ to the Observance of the same, not as to the Obser-

— vance

-vance of Laws of any foreign Prince, Potentate or Prelate, but
as to the customed and ancient Laws of this Realm, originally
established as Laws of the same, by the said Sufferance, Con-
+25. H. 8. c. 21. s. 1. sents and Customs, and none otherwise+."

Some Writers, when they describe that Usage which is
the Foundation of Common Law, characterise it by the Epithet
immemorial. The parliamentary Description is not so strong.
"Long Use and Custom" is assigned as the ~~[illegible]~~
Criterion of Law, "taken by the People at their ~~at~~ free Liberty, and by their own Con-
sent." And this Criterion is surely sufficient to satisfy the
Principle: For Consent is certainly proved by long, though
it be not immemorial, Usage.

That Consent is the probable Principle of the Common Law is
admitted by the Author of the Commentaries himself. "It is
one of the characteristic Marks of English Liberty says he, that
our Common Law depends upon Custom; which carries
this internal Evidence of Freedom along with it, that it pro-
''Bl. 74. bably was introduced by the voluntary Consent of the People''."
I search not for Contradictions: I wish to reconcile what is
seemingly contradictory. But if the Common Law could be
introduced, as ~~I think it~~ it is admitted it probably was, by
the voluntary Consent of the People; I confess I cannot recon-
cile, with this - certainly a solid - Principle, ~~another~~ the Principle
that, "a Law always supposes some Superior, who is to make
=Bl. 43. it=," nor another Principle - ~~that it is Part of the Definition of a~~
~~[illegible] municipal Law that "it be" prescribed by the~~
‡ Bl. 44. ~~"supreme Power in a State‡;" nor still another Principle~~, that
# Bl. 46. "Sovereignty and Legislature are indeed convertible Terms#."

A Power far beneath the sovereign Power, may be in-
vested with legislative Authority; and its Laws may be as
obligatory as any other human Laws. Of this Instances occur

in

~~in every Government; they occurred, in a very remarkable Manner in the Roman Republic, and they occur too~~, even in the Government of Great Britain.

It is necessarily and inseparably incident to ~~every~~ all Corporations, to make Bye Laws or private Statutes for ~~their~~ better Government. These Laws are binding upon themselves, unless contrary to the Laws of the Land, and ~~then~~ they are void. From these Positions we clearly infer that Laws obligatory upon those, for whom they are made, may enacted by a Power so far from being absolute and supreme, that its Laws are void, when contrary to those enacted by a superior Power: So far do Sovereignty and Legislature ~~appear~~ in this Instance at least, appear to be so far is it from being requisite to the very Essence of a Law, that it be made by the supreme Power. from convertible Terms.+ Sir William Blackstone tells us, that in the Provincial Establishments in America, the Assemblies had the Power of making local Ordinances; that subordinate Powers of Legislation subsisted in the proprietary Governments; and that in the Charter-Governments, the Assemblies made Laws suited to their own Emergencies: And yet, in these Instances, he certainly did not admit that "by sovereign Power is meant the making of Laws."

+Bl. 475. 476.

+ Bl. 46.

=. Bl. 46.

= Bl. 49.

I hope I have now shewn that the Definition of municipal Law in the Commentaries is not calculated even for the Meridian of Great Britain: It is still less calculated for that of many other Governments: For in many other Governments, the Distinction is still more strongly marked between the sovereign and the legislative Powers.

In the original Constitution of Rome, the sovereign Power, the Dominium eminens, as it is called by the Civilians, always resided in the collective Body of the People." But the Laws of Rome were not always made by ~~the~~ that collective Body.

" Bever. 6.

+ So

To the Senate was indulged a Privilege of Legislation; partial and subordinate, it is true; but still a Privilege of Legislation. An Act of the Senate was not, ~~indeed~~, considered as a permanent Law; but it was allowed to continue in Force for one Year; not longer, unless it was ratified by the People.+ To the Plebeians, exclusive of the Senators and Patricians, a Privilege of Legislation was also indulged; but their Laws bound only themselves.‖ While we are taking Notice of the different Bodies that possessed the Power of Legislation in Rome, it is proper to mention one very great Defect, which existed in the Constitution of that celebrated Republic. A Power inferior to that which made a Law, could dispense with it. The Senate, by its own Decree could dispense with a Law, made by the whole collective Body of the People. This Power, dangerous in every free Government, was often exercised, in Rome, to accomplish the most pernicious Purposes.# A

+ Bever. 81.

‖ Bever. 78.

Bever. 182.

~~Neither~~ In the united States, ~~nor~~ and in ~~any~~ each of the Commonwealths, of which the Union is composed, ~~is~~ the Legislative is very different from the supreme Power. Instead of being uncontrollable, the legislative Authority is placed, as it ought to be, under just and strict Control. The Effects of its Extravagancies may be prevented, sometimes by the executive, ~~at other Times~~ sometimes by the judicial Authority of the Governments; ~~and~~ sometimes even by a private Citizen, and, at all Times, by the superintending Power of the People at large. These different Points will afterwards receive a particular Explication. At present, perhaps, this general Position may be hazarded — That whoever would be obliged to obey a constitutional Law, is justified in refusing to obey an unconstitutional Act of the Legislature — and that, when a Question even of this delicate Nature occurs; every one who is called to act, has a Right to judge: He must, it is true, abide by the Consequences of a wrong Judgment.

Puffendorff, from whom the Idea of a Superior as forming a necessary Ingredient in the Idea of Law, ~~appears~~ seems to have been transplanted into the Commentaries, insists much, upon what he calls a Maxim — that a Person cannot oblige himself: And this Maxim,

he

A In the Government of *Media*,+ an opposite Extreme + prevailed. When an Edict was once published, it was not in the Power of the Legislator to alter or repeal it: The same Power, which is sufficient to make, should be sufficient to abrogate a Law

3. Gog. 11.

25.
+Puff. 60.
||Puff. 688

he tells us, is not confined to *single Men*, but extends to *whole Bodies* and *Societies*+: For a Person to oblige himself under the Notion of a Law-giver, or of a Superior, is an Impossibility. Hence the Inference seems to be drawn that "Obligations are laid on human Minds by a *Superior*||— To different Minds, the same Things, sometimes, appear in a very different Manner. If I was to make a Maxim, upon this Subject; it would be precisely the Reverse of the Maxim of Baron Puffendorff. Instead of saying that a Man cannot oblige himself; I would say, ~~that a Man can oblige him~~ but that he certainly can oblige himself ~~self, and~~ that no other Person upon Earth can oblige him.— Consent is the sole Principle, on which any Claim, in Consequence of human Authority, can be made upon one Man by another. I say, in Consequence of human Authority; for, in Consequence of the divine Authority, numerous are the Claims that we are reciprocally entitled to make, numerous are the Duties, that we are reciprocally obliged to perform. But none of these can enter into the present Question. We speak of Authority merely human. Exclusively of the Duties required by the Law of Nature, I can conceive of no Claim that one Man can make upon another, but in Consequence of his own Consent. Let us, upon this Occasion, as we have done upon some others, simplify the Object by a plain and distinct *Analysis*. Let us take for the Subject of our Analysis the very Question we are now upon— Whether a Man can be bound by any human Authority except his own Consent? Let us suppose that one demands *Obedience* from me to a certain ~~*Law*~~ Injunction, which he calls a *Law*, ~~which~~ by ~~[illegible]~~ performing some Service, pointed out to me. I ask him why am I obliged to obey it? ~~[illegible]~~ He says it is *just* I should do it. Justice, I tell him, is a Part of the Law of Nature; give me a Reason drawn from *human* Authority. He tells me, *he* had promised it. Very well, perform *your* Promise. Suppose he rises in his Tone, and tells me he *orders* it. Equal and free, I see no Reason for obeying the Order of one, who is only equal and free. Repelled from his

Attack

Attack upon my Independence, he assails me on a very different Quarter, and, softening his Accents, represents how generous, nay how humane it would be to do as he desires. Humanity is a Duty; Generosity is a Virtue; but neither is to be referred to human Authority. Let Invention be put upon the ~~Torture~~ Rack; and the severest Torture will not draw from it a Discovery of any external human Authority, by which I am obliged to obey the supposed Law, or to perform the supposed Service. He tells me next: ~~You~~ that I promised to do it. Now, indeed, I discover an human Source of ~~human~~ Obligation. If I promised to do it; I am bound to do it, unless the Promise is either unlawful or discharged, dissolved by an equal, or prohibited by a superior Authority. ~~Each of you may try, at your leisure~~. But this Promise originated from Consent; for if it was the Abortion of Compulsion — the Effect sometimes of exterior and superior human Power, but never of human Authority — I am not bound to consider it as my Act and Deed. ~~Each of~~ You may try, at your leisure, to discover ~~some~~ other Source of human Authority; and if any of you think ~~yourselves~~ himself successful, he will oblige me by communicating to me the Result.

Let us now vary the Supposition a little. Suppose the Demand to be made upon me by one, of whose superior Judgment and unimpeached Veracity I had the strongest and best founded Belief: Suppose me at that Period of Life — for there is such a Period of Life — when I would believe implicitly whatever was taught me by one, whom, I knew, I could so well trust. Suppose this Person, respected for his Knowledge and Integrity, should tell me, that he really thought it my Duty to comply with the Demand. I think I should probably feel a Sense of Obligation arise within me.

But

But why? — Because this respected Person says it? No. But, for a Reason which may be easily mistaken for this: because I believe that what this respected Person says ~~[illegible]~~ must be true; Here, indeed, is a Species of external human Authority, exerted and obeyed for the wisest Purposes: But this ~~Authority~~ is very different from that external human Authority which is opposed by some as the Source of Obligation in human Laws. This Species of Authority is said to have been carried to a very great Height by *Pythagoras*, the celebrated Philosopher. He delivered it as a Maxim, and it was received as such in his School ~~as a Maxim~~, that whatever he said must be true. Ipse dixit, was an undisputed Authority. ~~Let me suppose that~~ But if Folly and Falsehood had been as inseparably associated with the Character of *Pythagoras*, as Veracity and Wisdom were in the Minds of his Followers, — I ask — would his ipse dixit have been received as an ~~an~~ undisputed Authority? I presume not. To ~~[illegible]~~ recur, then, to the Supposition, which I last made; I would feel the Sense of Obligation arise in me, not because I would think it *his* Will that I should comply with the Demand; but because I would believe in *his* ~~Superior~~ *Opinion*, that it was *my Duty* to do so: — This refers to a very different Source ~~to do so~~. For let me suppose a little farther, that, after feeling this Sense of Obligation arise within me, I should come to learn, either from my own Observation, or from Authority, still superior to that of the Person, in whom I placed my Confidence, that this Confidence was misplaced; that what he told me proceeded either from Mistake or from some Thing worse than Mistake; *his Will* might continue the *same*, and my Opinion concerning it might continue the same, but *my Sense of Obligation* would be *greatly altered*. These Remarks, I hope, will be sufficient to shew that no exterior human Authority can bind a free and independent Man.

The next Question is — can a Man bind himself? Baron Puffendorff lays it down as a Maxim, that he cannot: And ~~from~~ on this Maxim, applied to public Bodies as well as private Individuals

-vidual, he builds a very interesting Series of Argumentation — just, indeed, and unanswerable, if the Basis, on which it rests, be solid and sound.

We have, at last, reached the Bottom of the Business. We are now come to the important Question, the Resolution of which, must, in my Opinion, decide the Fate of all human Laws. I say, in my Opinion; for I have already given my Reasons for thinking, that ~~if~~ ~~a Man cannot~~ if a Man cannot bind himself, no human Authority can bind him. For one Man, equal and free, cannot be bound by another, who is no more. The Consequence necessarily is, that, — if a Man can be bound by any human Authority; it must be by himself. A farther Consequence necessarily is, that if he cannot ~~be bound by his own Authority~~ bind himself; there is an End of all human Authority, and of all human Laws. How differently, sometimes, Things turn out, from what was expected from them! The Idea of Superiority, it was probably thought, would strengthen the Obligation of human Laws. When traced minutely and accurately, we find, that it would destroy their very Existence. If no human Law can be made without a Superior; no human Law can ever be made — First Principles ought to be admitted with Caution indeed. When you first read, in the Commentaries, this Principle — "A Law always supposes some Superior, who is to make it;"† You did not suspect, I presume, that this Principle is subversive of all human Laws. ~~You are now, I imagine, ready to feel that it is;~~ But You ~~see~~ now ~~satisfied~~ perceive, that, if ~~he~~ a Man can be bound by any human Authority; it must be by his own. But is he his own Superior? ~~Nothing less than~~ The creative Imagination of a ~~Blackmore~~ Theobald himself could not suggest the Fancy. ~~I~~ He could only go so far as to say,

"None but himself can be his Parallel."

Even the Master of a Show, who boasted, that his ~~Elephant~~ was "the greatest Elephant in the World," thought it necessary — or preeminently majestic — to add — "except himself."

† Bl. 43.

But

But to resume seriously the important Question — Can a Man bind himself? ~~Mighty Effects sometimes flow from Causes seemingly trivial, and~~ Simple Facts have sometimes led to the greatest Discoveries. ~~The Falling of an Apple from a Tree first suggested to Newton~~ ~~The~~ The sublime Theory of Gravitation was first suggested to Newton ~~from~~ by ~~the Falling~~ an Apple falling from a Tree.

At the End of the second Volume of the Commentaries are Precedents of some useful Instruments, known to the Law of England. Among others, there is a Precedent of a common Bond. In that Bond, are these Words written — I bind myself — This Form of a Bond has been known and ~~of~~ used and approved in England from Time immemorial. If a Man cannot bind himself, then all the ~~Obligations~~ Bonds that have been executed in England have been mere Nullities. The substantial Parts of that Bond are Parts of the Common Law of England. The ~~Words~~ Part, which I have mentioned, ~~forms the~~ is certainly a most substantial ~~Part~~ one. All Parts of the Precedent are not substantial: Many of them may be omitted or altered without vitiating the Force of the Bond. The Law does not require any particular Form of Words ~~as necessary to a Bond~~: But one Thing it strictly requires — such Words as declare the Intention of the Party, and denote his being bound: Such Words will be sufficient[+]: Such Words will be carried into Effect by the Judgment of the Law. ~~You have heard much concerning the Forms of Pleading: Much has been written in Praise; much has been written in Ridicule of this Part of Law-learning. It has certainly been abused. In some Hands it certainly has become, and daily becomes ridiculous: And what is there that has been exempted from a similar Fate? Religion herself, elegant and simple as she is, yet, when dressed in the awkward~~ ~~Modes~~ ~~Robes~~ ~~attire~~ ~~put upon her by the false Party of her injudicious Friends, sometimes assumes a ridiculous Appearance. Law has experienced the same Treatment with her elder Sister. Though the Learning with Regard to Pleas and Pleading has been abused~~

[+] 3. Bac. 992.

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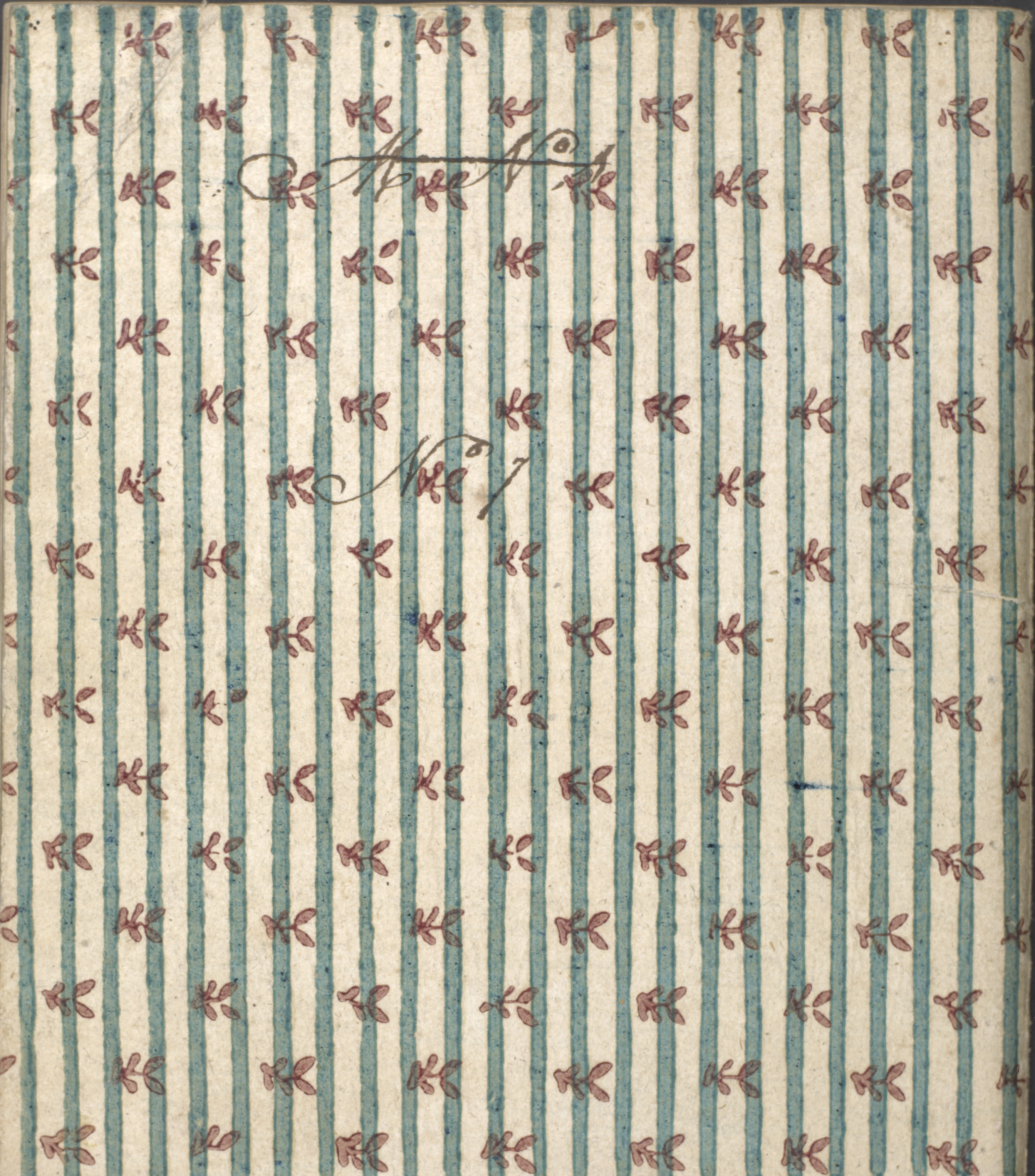

~~Me N° 1~~

N° 7